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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-682

SANTA CLARA PUEBLO, et al.,
Petitioners,

v.

JULIA MARTINEZ, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

ALAN R. TARADASH
RICHARD B. COLLINS
Box 306
Window Rock, Arizona 86515
Telephone: 602/871-4151
Counsel for Respondents

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RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

Respondents Julia and Audrey Martinez respectfully submit the following brief in opposition to certiorari. This brief addresses the petition for certiorari, received by respondents' counsel on November 17, 1976; the proposed *amici curiae* brief of the Shoshone and Arapahoe Tribes etc., et al., received on December 1, 1976; and the proposed *amici curiae* brief of the Seneca Nation etc., et al., received on December 8, 1976. On December 15, 1976, the Clerk of the Court granted respondents' motion for an extension of time in which to file this brief until January 5, 1977.

OPINIONS BELOW

The Court of Appeals' opinion is reported at 540 F.2d 1039 (10th Cir. 1976). The District Court's opinion is reported at 402 F.Supp. 5 (D.N.Mex. 1975).

QUESTIONS PRESENTED

1. Do the federal district courts have subject matter jurisdiction over an action to determine whether a tribal membership ordinance conflicts with the equal protection and due process guarantees of the Indian Civil Rights Act?

2. Does the Indian Civil Rights Act abrogate the immunity from suit of an Indian tribe in cases arising under the Act?

3. Did the Court of Appeals apply the correct legal standard under the Indian Civil Rights Act to the facts of this case?

STATEMENT OF THE CASE

Pursuant to Rule 40.3, respondents' statement is limited to those points necessary to correct inaccuracies and omissions in the Petition.

Respondent Julia Martinez is a full-blooded Santa Clara Indian and a member and lifelong resident of the Pueblo. Her husband, Myles Martinez, is a full-blooded Navajo Indian and has resided at the Santa Clara Pueblo since his 1941 marriage to Julia, except for his military service in World War II. Their children, respondent Audrey Martinez and her brothers and sisters, are thus of 100 per cent Indian ancestry and 50 per cent Santa Clara ancestry. They are lifelong Pueblo residents except for time away at school. All the Martinez children speak and understand Tewa, the traditional and official language of the Pueblo; practice traditional customs; and are accepted into the ancient religion of the Pueblo.

These facts led the district court to find that the Martinez children "are culturally, for all practical purposes, Santa Clara Indians." Petition page 26a (402 F.Supp. at 18). The Court of Appeals concluded that they "are, culturally, members of the Pueblo." Petition page 31a (540 F.2d at 1041).

The 1939 Pueblo Ordinance denies Pueblo membership to the Martinez children. As a result they are unable to obtain land use rights, in particular to receive a gift or devise of their mother's house and land. They are also denied all rights to vote or participate in Pueblo political life. Most importantly, the Pueblo's written constitution specifies that only members have the right to remain at the Pueblo. R. vol. I, p. 97. At present the children reside with their mother, but if she predeceases them, they face expulsion from their cultural homeland.

By contrast the 1939 Ordinance requires membership of male-line children, even if they are only half Indian or less; even if they have never lived at the Pueblo; and even if they know nothing of its language or religion. Actual examples of these situations appear in the record. Petition page 26a (402 F.Supp. at 18).

At trial, petitioners contended that the 1939 Ordinance is essential to the traditional Pueblo religion, but the district court expressly found to the contrary. Petition page 21a (402 F.Supp. at 16). Petitioners also contended that the 1939 Ordinance merely codified an ancient rule. However, the Pueblo's written constitution of 1935 states that membership for children of mixed marriages would be dealt with on a case by case basis; no discrimination is mentioned. Also, the record is replete with evidence that in fact this was the practice prior to 1939 (and prior to 1935), and that in a number of cases female-line children became members prior to 1939. Petition page 44a (540 F.2d at 1047); Petition page 21a (402 F.Supp. at 16). It is also clear that the reasons for this new rule were economic, to reduce the claimants to Pueblo land and money. Petition page 44a (540 F.2d at 1047); Petition page 20a (402 F.Supp. at 15).

Petitioners allege several points that are misleading. They claim that the Martinez children now enjoy federal services

available to Indians. This is true as far as it goes, and the district court did so find. However, prior to 1968 they were denied such services, and it was only the terminal illness of the Martinez' deceased daughter Natalie which persuaded federal officials to allow them health services despite lack of tribal membership. R.Tr. pp. 15-17, 46-48, 50-51. Also, they could be denied benefits in the future, since benefits are often tied to tribal membership. Petition page 44a (540 F.2d at 1047).

Petitioners also claim that the Martinez children enjoy "all material rights" of members. Petition page 9. This is plainly false as regards the all-important rights to use Pueblo land, to inherit their mother's home, and to remain at the Pueblo after her death. The evidence showed only that non-member residents of the Pueblo are usually permitted to hunt, gather firewood, and the like.

Petitioners state that Julia Martinez was "aware of the consequences" if she married a non-member. What the cited evidence shows is that Mrs. Martinez had been told of the "paper" on this subject, that is, the 1939 Ordinance, which was two years old at the time of her marriage. Other evidence showed that in 1942 the Pueblo contemplated exceptions to the Ordinance upon payment of a fee (Plaintiffs' Trial Exhibit 15). The 1939 Ordinance had not yet hardened into the irrebuttable presumption of today.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS ON THE JURISDICTIONAL ISSUES URGED BY PETITIONERS

Petitioners question generally the subject matter jurisdiction of the district court; they urge that the Santa Clara Pueblo is immune from suit; and they contend that there is

no federal court jurisdiction over tribal membership questions in particular. Petition pages 10-17. Petitioners do not contend that there is a conflict between the circuit courts of appeals on any of these questions. However, a proposed *amici* brief appears to argue such a conflict. Brief *Amici* of the Seneca Nation etc., et al., at page 9, footnote 4. This assertion is incorrect. All circuit courts of appeals which have addressed the Indian Civil Rights Act have agreed on these jurisdictional issues and have sustained federal court jurisdiction.

A. *Subject Matter Jurisdiction.*

Four circuits have sustained jurisdiction pursuant to 28 U.S.C. § 1343 and/or § 1331 to hear cases arising under the Indian Civil Rights Act, provided that internal remedies within the tribal government are first exhausted.[1] *Luxon v. Rosebud Sioux Tribe*, 455 F.2d 698, 699 (8th Cir. 1972); *Daly v. United States*, 483 F.2d 700, 704 (8th Cir. 1973); *Brown v. United States*, 486 F.2d 658, 661 (8th Cir. 1973); *Johnson v. Lower Elwha Tribal Community*, 484 F.2d 200, 203 (9th Cir. 1973); *Laramie v. Nicholson*, 487 F.2d 315 (9th Cir. 1973), *cert. denied*, 419 U.S. 871; *Thompson v. Tonasket*, 487 F.2d 316 (9th Cir. 1973), *cert. denied*, 419 U.S. 871; *Howlett v. Salish and Kootenai Tribes*, 529 F.2d 233, 236 (9th Cir. 1976); *Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231, 1233 (4th Cir. 1974); *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 933 (10th Cir. 1975). *See also, Seneca Constitutional Rights Org. v. George*, 348 F.Supp. 48, 50 (W.D.N.Y. 1972).

B. *Tribal Immunity from Suit Abrogated.*

The same four circuits have ruled that the Indian Civil Rights Act is an exception to tribal immunity from suit and

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[1]It is undisputed here that Julia Martinez has unsuccessfully sought to have her children enrolled since 1946 and has thus exhausted all tribal remedies. Petition pages 10a-11a (402 F.Supp. at 10-11).

abrogates that immunity in cases where the Act applies. *Daly v. United States, supra,* 483 F.2d at 705; *Brown v. United States, supra,* 486 F.2d at 661; *Means v. Wilson,* 522 F.2d 833, 841 (8th Cir. 1975); *Johnson v. Lower Elwha Tribal Community, supra,* 484 F.2d at 202; *Laramie v. Nicholson, supra; Thompson v. Tonasket, supra; Howlett v. Salish and Kootenai Tribes, supra,* 529 F.2d at 236; *Crowe v. Eastern Band of Cherokee Indians, Inc., supra,* 506 F.2d at 1233; *Dry Creek Lodge, Inc. v. United States, supra,* 515 F.2d at 934. *See also, Seneca Constitutional Rights Org. v. George, supra,* 348 F.Supp. at 50.

C. *Tribal Membership Is Subject to the Indian Civil Rights Act.*

The Indian Civil Rights Act expressly imposes its standards on *"all* governmental powers possessed by an Indian tribe, executive, legislative, and judicial . . . " 25 U.S.C. § 1301(2) [emphasis added]. Accordingly, the two circuits which have ruled on membership cases arising under the Act (9th and 10th), as well as the Interior Department, have applied the Act to membership questions.

The other circuit court of appeals to rule on a tribal membership case sustained federal court jurisdiction, and this Court denied review. *Laramie v. Nicholson,* 487 F.2d 315 (9th Cir. 1973), *cert. denied,* 419 U.S. 871; *Thompson v. Tonasket,* 487 F.2d 316 (9th Cir. 1973), *cert. denied,* 419 U.S. 871.

The Interior Department also interpreted the Indian Civil Rights Act to extend to tribal membership questions. In 76 I.D. 353 (1969), the Interior Solicitor disapproved a tribal membership law as being repugnant to 25 U.S.C. § 1302(8). This decision was issued shortly after enactment of the Indian Civil Rights Act, and the Interior Department played a major role in the proceedings leading to its enactment.

II. THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARD TO THE FACTS OF THIS CASE.

A. *Petitioners and Amici Ignore the Facts.*

The Petition and the two proposed *amici* briefs argue with virtually no attention to the facts of this case. The facts about the Martinez children led the district court to conclude that they "are culturally, for all practical purposes, Santa Clara Indians." Petition page 26a (402 F.Supp. at 18). The Court of Appeals likewise concluded that the Martinez children "are, culturally, members of the Pueblo." Petition page 31a (540 F.2d at 1041). Significantly, these findings are not in any way questioned by petitioners or proposed *amici.*

It is also undisputed that the Martinez children cannot inherit their mother's house at the Pueblo and face explusion from their homeland should she predecease them.

Despite these facts, petitioners' sole justification for the ordinance is alleged cultural survival. They even rely on testimony by the Pueblo Governor that without the ordinance, they would suffer an influx of unknown outsiders (Petition page 28) — a claim that is ludicrous when measured against the Martinez family's situation.

The Court of Appeals rightly concluded that the Pueblo "has not shown how such an incongruous and unreasonable result fosters and promotes cultural survival." 540 F.2d at 1047.

The importance of the point made here was identified in an early law review commentary on the Indian Civil Rights Act. Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments,* 82 Harv.L.Rev. 1343 (1969).[2] This Note distinguishes between cultural "out-

[2]Both petitioners and proposed *amici* Seneca Nation etc., et al., cite to and rely on this Note.

siders" and persons "within the cultural group" who "have been allowed to develop a substantial stake in it" and are "ethnically related to the tribe," and argues that the latter should be protected by the Act. 82 Harv.L.Rev. at 1363.

Respondents do not dispute the Pueblo's right to exclude *true* outsiders or to pass rules actually related to cultural survival. But no such rules are at issue here.

These considerations also bear on the claim that this decision will have an important impact on other Indian tribes. While the claim is made that a few other tribes have male-line or female-line traditions, there is no showing that any other tribe applies a rigid rule of this kind to expel cultural insiders. For example, the Navajos and western Pueblos have very strong female-line traditions, but these have no bearing on tribal membership. Respondents suggest that the facts of this case are unique.

These facts reveal two kinds of discrimination: Julia Martinez is denied rights accorded her male counterparts and thus suffers discrimination on the basis of her sex. Audrey Martinez and her four brothers and three sisters suffer ancestry discrimination, being denied rights accorded male-line children otherwise identically situated. Furthermore, the alleged need for the rule, cultural preservation, creates an irrebuttable presumption of cultural identity, a presumption which the Martinez children obviously belie.

This Court has repeatedly condemned unjustified governmental rules in each of these three categories. As to sex discrimination, *see Stanton v. Stanton*, 421 U.S. 7 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971). Ancestry discrimination of many kinds has been condemned. *See, e.g., Hernandez v. Texas*, 347 U.S. 475 (1954); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Finally, permanent presumptions were condemned in *Stanley v. Illinois*, 405 U.S. 645 (1972); *Vlandis v. Kline*,

412 U.S. 441 (1973); and *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974).

A lower court decision involving issues similar to the instant case is *Samuel v. University of Pittsburgh*, 375 F.Supp. 1119 (W.D.Pa. 1974), *appeal dismissed*, 506 F.2d 355 (3d Cir. 1974).

B. *There Is No Conflict Among the Circuits on the Legal Standard to Be Applied.*

Both of the proposed *amici* briefs suggest that the interpretation of the Indian Civil Rights Act by the Court of Appeals differs from the interpretation of the Act by the 8th and 9th Circuits. Brief *Amici* of the Shoshone and Arapahoe Tribes, etc., et al., at page 5; Brief *Amici* of the Seneca Nation, etc., et al., at page 13. However, this assertion will not withstand analysis.

The cases from the 8th and 9th Circuits, as well as those from the 10th, all agree that the tribal interest in cultural autonomy is entitled to consideration in an Indian Civil Rights case; that it is to be weighed against the individual interest involved; and that this creates differences from the application of the 14th Amendment to the States in some cases. But the language of 25 U.S.C. § 1302(8) is identical to the corresponding language of the 14th Amendment, and all the circuit courts have recognized the obvious affinity of the two laws. *See* generally the cases cited above at pages 5-6.

Amici select two cases where circuit courts sustained tribal rules to argue their conflict claim. However, these cases are based on very different facts from the instant case, and the legal analysis is in fact similar. In *Howlett v. Salish and Kootenai Tribes*, 529 F.2d 233 (9th Cir. 1976), the court sustained a tribal law requiring one year residency on the reservation to be eligible to run for a tribal office. However,

the court clearly exercised its jurisdiction to weigh the tribal interest against the individual interest, just as the court below did. In *Howlett*, the court noted that the harm to the individual must be weighed in deciding whether to depart from 14th Amendment standards:

> Where the strict application of traditional equal protection doctrines would significantly impair a tribal practice or alter a custom firmly embedded in Indian culture, *and where the individual injury alleged by the tribal member is, by comparison, not a grievous one,* then the equal protection clause at 25 U.S.C. § 1302(8) may be implemented somewhat differently than its constitutional counterpart.

529 F.2d at 238 [emphasis added]. The court later noted that "plaintiffs are not barred from becoming eligible candidates in the future. Their candidacy is only delayed — not barred." 529 F.2d at 244. The court also found a compelling governmental interest to sustain the tribe's rule, using analysis much like that in 14th Amendment cases. By contrast, the harm to the Martinez children is obviously vastly greater, as they face expulsion from their cultural homeland.

The other case relied on, *Daly v. United States*, 483 F.2d 700 (8th Cir. 1973), imposed reapportionment upon the tribal council under 14th Amendment standards but sustained a minimum blood quantum (half Indian ancestry) rule. Discrimination in favor of persons of a certain degree of Indian blood is, however, a uniquely compelling interest of Indian tribes, and it has been sustained under the Fifth Amendment. *See, Morton v. Mancari*, 417 U.S. 535 (1974). It is so recognized in the history of the Indian Civil Rights Act and by the courts, including the court below. *See, e.g.*, Note, 82 Harv.L.Rev. 1343, 1362 (1969). The *Daly* court sustained the blood quantum rule on the finding of a "significant cultural interest" of the Tribe, a form of analysis similar to that employed in 14th Amendment cases and differing only in the nature of the interests found to justify a discrimination.

C. *Legislative History.*

The Congressional intent behind the legislation which became the Indian Civil Rights Act of 1968 was clearly stated by its chief sponsor, Senator Sam Ervin:

> The purpose of S. 1843, as amended, is to insure that the American Indian is afforded the broad constitutional rights secured to other Americans. The purpose of Title I [25 U.S.C. §§ 1301-1303] is to protect individual Indians from arbitrary and unjust actions of tribal governments. This is accomplished by placing certain limitations on an Indian tribe in the exercise of its powers of self-government. *These limitations are the same as those imposed on the United States by the U.S. Constitution and on the States by judicial interpretation.*

S.Rep. No. 841, 90th Cong., 1st Sess. 5-6 (1967) [emphasis added]. *See also* S.Rep. 721, 90th Cong., 2d Sess., 1968 U.S. Code Congr. & Admin. News pp. 1863-1865.

By contrast petitioners and proposed *amici* rely primarily on reports of some of the hearings on the various bills that led to passage of the Act. Some of the witnesses at these hearings actually opposed passage of the Act, as the court below noted in its analysis of this subject. Petition page 39a (540 F.2d at 1045). Plainly, their view was rejected by Congress.

D. *Petitioners' Proposed Interpretation Would Reduce § 1302(8) to a Nullity.*

Petitioners urge a very restricted interpretation of § 1302-(8), confining it to insuring the "even-handed application"

of tribal laws. Petition pages 27-28. However, this so-called "even-handed application" theory would reduce § 1302(8) to a nullity, because any discrimination, no matter how arbitrary or unjustifiable, can be reduced to a fixed rule. This interpretation would, for example, immunize a tribal law discriminating between blacks and whites.

The sole case relied on for this theory, *Daly v. United States, supra,* does not when fairly read support it. As previously noted, the *Daly* court ordered reapportionment of a tribal council but sustained a tribal minimum blood quantum rule. The court first considered whether there was sufficient tribal governmental interest to justify either tribal action involved. In the case of legislative districting, the court concluded that there was not; in the case of the blood quantum rule, the court concluded that there was. The court went on to note the Tribe's justification would not, however, support unequal application of the blood quantum rule. In other words, the notion of "even-handed application" only appeared after the court had determined that this rule itself was justified. Respondents submit that this is the same analytical process used in 14th Amendment review of a state law. To be sure, the nature of the governmental interests which may justify a discrimination will sometimes differ, but the analysis is the same.

CONCLUSION

Those courts of appeals which have addressed cases arising under the Indian Civil Rights Act have unanimously agreed on federal jurisdiction over such cases, provided that internal remedies within the tribal government are first exhausted (as here). The courts have further agreed on the standards to be applied, giving due consideration to a tribe's governmental interest, which is to be weighed against the individual interest involved. The Court of Appeals in this case applied

these settled rules and correctly concluded that the very serious harm to plaintiffs could not be justified by the "incongruous and unreasonable" tribal interest claimed. For these reasons, review by this Court should be denied.

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Respectfully submitted,

ALAN R. TARADASH
RICHARD B. COLLINS
Box 306
Window Rock, Arizona 86515
Telephone: 602/871-4151

Counsel for Respondents